LIBRARY
SUPREME COURT, U. S.

FILED
DEC 15 1973
CLERK

No. 73-789

IN THE

# Supreme Court of the United States

OCTOBER TERM 1973

HOISTING AND PORTABLE ENGINEERS
LOCAL 450 OF THE INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO,

*Petitioner,*

v.

PENCE CONSTRUCTION CORPORATION,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. J. HARPER II
L. G. CLINTON, JR.

*Of Counsel,*

FULBRIGHT & CROOKER
Bank of the Southwest Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, HOUSTON

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Index of Cases | i |
| Opinions Below | 1 |
| Question Presented | 1 |
| Statement of the Case | 2 |
| Reasons for Denying Writ | 3 |
| I. The Decision of the Court of Appeals Correctly Applied Federal Law in the Company's Action under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 | 3 |
| II. The Union's Strike is not Entitled to the Protection of Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143 | 6 |
| III. The Exclusion of the Testimony of the Union's Business Representative does not Present an Issue Warranting Review by this Court | 8 |
| Conclusion | 8 |
| Certificate of Service | 9 |


## INDEX OF CASES


| | |
|---|---|
| *B.L.F.&E.* v. *Kennecott Copper Corp.*, 338 F.2d 224, 226 (10th Cir. 1964) | 4 |
| *Clothing Workers* v. *United Garment Manufacturing Co.*, 338 F.2d 195, 199 (8th Cir. 1964) | 4 |
| *Drake Bakeries, Inc.* v. *Local 50, Bakery Workers*, 370 U.S. 254 (1962) | 4 |
| *Garver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) | 6 |
| *Gateway Coal Company* v. *United Mine Workers of America*, 466 F.2d 1157 (3rd Cir. 1972) | 6 |
| *Hanna Mining Co.* v. *United Steelworkers*, 464 F.2d 565, 568 n. 2 (8th Cir. 1972) | 7 |
| *Ice Cream Drivers* v. *Borden, Inc.*, 433 F.2d 41 (2d Cir.), *cert. denied*, 401 U.S. 940 (1971) | 4 |

| | PAGE |
|---|---|
| *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) | 4, 5 |
| *Local 721, Packing House Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964) | 4 |
| *Missouri-K-T R.R.* v. *The Brotherhood of R.R. Trainmen*, 342 F.2d 298 (5th Cir. 1965) | 7 |
| *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) | 5 |
| *Teamsters Local Unions* v. *Robinson*, 415 F.2d 740 (6th Cir. 1969) | 5 |
| *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957) | 3 |
| *United States Steel Corp.* v. *United Mine Workers*, 469 F.2d 729 (3rd Cir. 1972), cert pending | 6 |

No. 73-789

IN THE

# Supreme Court of the United States

OCTOBER TERM 1973

HOISTING AND PORTABLE ENGINEERS
LOCAL 450 OF THE INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO,

*Petitioner,*

v.

PENCE CONSTRUCTION CORPORATION,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

### OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is officially reported at 484 F.2d 398.

The opinion of the United States District Court for the Southern District of Texas is not officially reported and is attached to the Petition for Writ of Certiorari as Appendix "A".

### QUESTION PRESENTED

Whether or not, under the facts and circumstances of the case, the Company was entitled to recover damages incurred by it as a result of the Union's breach of a collective

bargaining agreement in an action under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

## STATEMENT OF THE CASE

Respondent would respectfully refer this Honorable Court to the opinion of the United States Court of Appeals for the Fifth Circuit (484 F.2d 398, Appendix "C" to the Petition for a Writ of Certiorari) for an accurate and concise statement of the facts of the case. Respondent (hereinafter referred to as "Company") would also submit the following amplification of the facts of the case which are believed necessary to a full understanding of the case.

The Company discharged one Charles E. Fitts, a shop steward, on or about January 16, 1973. The Petitioner (hereinafter referred to as "Union") struck and established picket lines. Contrary to the statement of the case presented by the Union in its Petition (p. 5), the arbitrator, the District Court and the Court of Appeals found that the Union's strike and picketing were motivated by the discharge of Fitts and not because of any unsafe working conditions. The decisions of the courts below are, on this factual matter, clearly supported by the evidence, including the statement of the Union's business representative, Robert L. Johnson.[1]

The second basic fact which should be borne in mind is that it was the Company who sought and compelled arbitration of the dispute. The Union demanded as a condition to any agreement on its part to arbitrate that the Company reinstate Fitts, and the subsequent strike and picketing were conducted in order to compel this reinstatement.

Pursuant to the order of the District Court compelling arbitration of the dispute a hearing was set before an

[1] As set forth in the Joint Appendix before the Court of Appeals, pp. 97-99.

arbitrator. The Union continued its strike and picketing through the day of the arbitration hearing. Prior to the submission of the case to the arbitrator, the parties agreed, by written agreement, to exclude from arbitration the issue of damages suffered by the Company. Following the hearing, the arbitrator issued his decision finding that the Company had violated the contract in discharging Fitts and finding that the Union had violated the contract by striking and maintaining its picket lines. Following the entry of the arbitrator's award, the Company sought enforcement of the award in the District Court and also sought recovery of damages it had incurred as a result of the Union's breach of the collective bargaining agreement. The amount of damages suffered by the Company was stipulated between the parties, and the District Court entered its final order enforcing the arbitrator's award and awarding the Company the amount of stipulated damages. (Appendix "A" to the Petition for a Writ of Certiorari).

## REASONS FOR DENYING THE WRIT

### I.

### THE DECISION OF THE COURT OF APPEALS CORRECTLY APPLIED FEDERAL LAW IN THE COMPANY'S ACTION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 185.

As the Court of Appeals correctly noted (484 F.2d at 400-401), under the decision of this Court in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957), the correct substantive law to apply in suits under Section 301 is federal law. The body of federal law built up by the decisions of this Court and by the Circuit Courts of Appeal clearly establish that the decision of the Fifth Circuit in

this case was correct. This Court, as well as the Circuit Courts of Appeal which have considered the question, has consistently held that one party to a collective bargaining agreement is not relieved of its obligations or responsibilities under that agreement because of a breach of the agreement by the other party. In *Local 721, Packing House Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964), this Court held that a union's strike over the alleged wrongful discharge of an employee in violation of a no-strike clause neither barred the union from seeking to compel arbitration of its claim nor barred the employer from counterclaiming for the damages it had incurred as a result of the union's strike and work stoppage in violation of the no-strike clause *See also Drake Bakeries, Inc.* v. *Local 50, Bakery Workers*, 370 U.S. 254 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Ice Cream Drivers* v. *Borden, Inc.*, 433 F.2d 41 (2d Cir.), *cert. denied*, 401 U.S. 940 (1971); *Clothing Workers* v. *United Garment Manufacturing Co.*, 338 F.2d 195, 199 (8th Cir. 1964); and *B.L.F.&E.* v. *Kennecott Copper Corp.*, 338 F.2d 224, 226 (10th Cir. 1964).

The Fifth Circuit found it unnecessary to determine whether or not the Union's contention regarding the law of Texas was correct since in its view the application of the law of Texas in this regard would not serve the uniform federal labor policy required under Section 301 of the Act,[2] and such determination is totally consistent with and supported by prior decisions of this Court *Local. 721, Packing House Workers* v. *Needham Packing Co.*, 376 U.S.

[2] 484 F.2d at 400. The law of Texas is not as clear as argued by the Union, but rather the law of Texas appears to be that before a breach of a contract by one party relieves the other party of liability under that contract, the breach must be a "material breach" going to the essence of the contract, rendering performance by the second party impossible.

247 (1964). *See also Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

Contrary to the Union's assertion in its Petition for a Writ of Certiorari (p. 8), the Company did not refuse to arbitrate Fitts' discharge, but rather, it was the Company who sought to compel arbitration of the dispute. Further, the Company did not deny Fitts a proper hearing under the parties' collective bargaining agreement (J.A., Court of Appeals, pp. 23-35), but, rather, was seeking by its actions in the state district court and in the United States District Court to compel the Union to comply with those procedures and secure the required hearing.

The decision of the United States Court of Appeals for the Sixth Circuit in *Teamster Local Unions* v. *Robinson*, 415 F.2d 740 (6th Cir. 1969), cited by the Union in its Petition for a Writ of Certiorari (p. 9) is clearly inapposite. The contractual provisions in the *Robinson* case contained an *express* exclusion from the general no-strike obligation of the unions and specifically recognized the unions' right to strike in the event the Company was delinquent on its health and welfare payments. No such exclusion, express or implied, is present or asserted in this case. Further, there was no finding by the arbitrator in *Robinson* that the unions' strike violated the contract. Such a finding was made in this case. In short, there is no conflict between the decision of the Fifth Circuit in this case and the decision of the Sixth Circuit in *Robinson*.

## II.

## THE UNION'S STRIKE IS NOT ENTITLED TO THE PROTECTION OF SECTION 502 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 143.

The Fifth Circuit, in rejecting the Union's contention that its strike was protected by Section 502 of the Act held that there was no evidence to indicate that "abnormally dangerous conditions" existed which imperiled the life or limb of the employees. 484 F.2d at 402. The Fifth Circuit, the District Court, and the arbitrator all concluded that the sole motivation for the strike was the discharge of the Union's steward. 484 F.2d at 402. As this Court has long held, it is a court of law rather than a court for the correction of errors in fact finding, and it does not undertake to review concurrent findings of fact by the courts below. *Garver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

As noted by the Fifth Circuit, there is an absolute dearth of evidence establishing that an abnormally dangerous condition existed or that the strike and picketing by the Union was in any way motivated by such "abnormally dangerous condition." The Union's reliance upon the Third Circuit's decisions in *Gateway Coal Company* v. *United Mine Workers of America*, 466 F.2d 1157 (3rd Cir. 1972) and *United States Steel Corp.* v. *United Mine Workers*, 469 F.2d 729 (3rd Cir. 1972), *cert. pending* are misplaced. This Court has granted certiorari in the *Gateway Coal* case (93 S.Ct. 1418) and oral argument has been presented. The *United States Steel Corp.* case relied exclusively upon the rationale of the *Gateway* case. Here, unlike *Gateway*, there was not and is not any contention or evidence that the lives or limbs of workers were jeopardized or imperiled by any safety condition existing at the project. The alleged, unspecified

unsafe conditions were not at the heart of the dispute in this case, but the Union's strike and picketing were over the discharge of the job steward and the Company's refusal to reinstate him as a condition precedent to arbitration. Indeed, there is no evidence that any grievance was carried to arbitration in connection with such alleged unsafe conditions nor did the Union continue to picket after the arbitrator ordered the reinstatement of the job steward, but rather the picketing ceased and the employees returned to work. This conclusion is clearly supported by the evidence, including the affidavit and testimony of the Union's business representative, Johnson (Joint Appendix, Court of Appeals, p. 96-99).

More in point to the facts of this case is the earlier decision of the Fifth Circuit in *Missouri-K-T R.R.* v. *The Brotherhood of R.R. Trainmen*, 342 F.2d 298 (5th Cir. 1965) and the recent decision of the Eighth Circuit in *Hanna Mining Co.* v. *United Steelworkers*, 464 F.2d 565, 568 n. 2 (8th Cir. 1972). The Eighth Circuit's decision in *Hanna* found *Gateway* inapposite and correctly, it is submitted, stated the principle thusly:

> "The trial court did not make a finding that the employees walked off the job in the good faith belief that the conditions for work were abnormally dangerous, and such a finding is necessary to bring . . . [Section 502] into play."

The essence of Section 502 of the Act is that the conditions are *abnormally dangerous*. No such allegation is made by the Union, even in its Petition for a Writ of Certiorari. Furthermore, the Company would submit that an overly broad reading of this section would open "Pandora's Box" and allow the exception provided in Section 502 to swallow the salutatory principle behind the policy precluding industrial strife through arbitration.

## III.

## THE EXCLUSION OF THE TESTIMONY OF THE UNION'S BUSINESS REPRESENTATIVE DOES NOT PRESENT AN ISSUE WARRANTING REVIEW BY THIS COURT.

Contrary to the Union's contention in its Petition for a Writ of Certiorari (p. 12), the Company did not twice refuse to arbitrate the discharge of Fitts. Indeed, the evidence establishes without contradiction that the Company was the party who sought and ultimately compelled arbitration of the matter. The only refusal by the Company was its refusal to reinstate Fitts to the job as a condition precedent to arbitration. The exclusion of Johnson's testimony by the District Court and the affirmance on this point by the Fifth Circuit under Federal Rules of Civil Procedure, Rule 61 (484 F.2d at 402-403) do not present any significant issue for review. The District Court considered the Union's argument of "justification" and rejected it, as had the arbitrator. Further, the District Court's refusal to consider the testimony of Johnson after determining that the same testimony had been presented to the arbitrator was correct, and, indeed, the very same evidence was already before the District Court in the form of an affidavit submitted by the Union's Business Representative in support of the Union's Opposition to Motion for Summary Judgment.[3]

## CONCLUSION

The decision of the Fifth Circuit in this case complies with the decisions of this Court in applying federal substantive law to this action arising under Section 301 of the Act. The decision of the Fifth Circuit is further correct in refusing to extend the protection of Section 502 of the

[3] Original Record, p .20, Exhibit A.

Act to the Union's strike and picketing in this case, and the exclusion of the testimony of the Union's Business Representative was, at most, harmless error within the meaning of Rule 61 of the Federal Rules of Civil Procedure.

WHEREFORE, PREMISES CONSIDERED, the Company respectfully prays that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. J. HARPER II
L. G. CLINTON, JR.

*Of Counsel,*

FULBRIGHT & CROOKER
Bank of the Southwest Building
Houston, Texas 77002

## CERTIFICATE OF SERVICE

I, A. J. Harper II, one of the Attorneys for Respondent Pence Construction Corporation, do hereby certify that on this 13th day of December, 1973, a true and correct copy of the foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served on the following by placing same in the United States mail, postage prepaid:

Mr. W. Arthur Combs
Combs & Archer
1220 Americana Building
Houston, Texas 77002

A. J. HARPER II